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No. 07-906

IN THE
Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS, Individually and on Behalf of Others Similarly Situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae the National Association of Manufacturers ("NAM") hereby moves this Court for leave to file this *amicus* brief.

The NAM is the nation's largest industrial trade association, representing approximately 11,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The brief of *amicus* NAM seeks to bring to the Court's attention trenchant public policy reasons that make granting *certiorari* in this case appropriate and important.

February 7, 2008

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INTEREST OF THE *AMICUS*[1]

The National Association of Manufacturers is the nation's largest industrial trade association, representing approximately 11,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. Many of its members will be affected by the decision in this case.

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[1] Counsel for *amicus* timely served the ten-day notice required by Rule 37.2(a) on counsel of record for the parties. Counsel for respondents declined to consent to the filing of this brief, thus requiring the motion for leave to file.

Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission. Robert A. Lonergan, Executive Vice President and General Counsel of Rohm and Haas Company, is a member of the Board of Directors of Atlantic Legal Foundation; he did not participate in any way in the decision of Atlantic Legal Foundation to represent the *amicus* in this case. Rohm and Haas Company has made annual contributions to Atlantic Legal Foundation in the past four years for the Foundation's general operating expenses, representing less than 2.0% of the budget of the Foundation during that period, and these contributions did not affect the decision of Atlantic Legal Foundation to represent the NAM as *amicus* in this case.

SUMMARY OF ARGUMENT

The Seventh Circuit held that a cost-of-living adjustment ("COLA") available to participants who elect to receive their benefits as a monthly annuity payment under the terms a retirement plan under the Employee Retirement Income Security Act ("ERISA") is part of the Plan participants' "accrued benefit" even though the Plan's provisions explicitly *exclude* the COLA from the definition of "accrued benefit" and that the COLA must therefore be provided to every participant in the Plan, including those who select a lump-sum distribution of their benefits.

Mandatory inclusion of COLA would have substantial negative impacts on other defined benefit plans, and encouraging lump sum withdrawals of pension funds increases the already substantial risk of underfunding of pension plans and exposes defined benefit pension plans to unforeseen financial liabilities that may leave many such plans chronically underfunded.

From a public policy perspective, annuities are preferable to lump sum distributions because lump sum distributions increase the risk that retirees will exhaust their retirement funds prematurely, placing a burden on the public fisc.

The Seventh Circuit overrode the clear language of the Rohm and Haas pension plan, which informed plan participants that no COLA would be paid on lump sum withdrawals, and expands the benefits available to participants beyond those they could reasonably have expected to receive under the Plan. The decision below is in conflict with the teaching of this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) that the plan itself determines the level of benefits, and with the statutory definition of "accrued benefit" under

ERISA, which expressly states that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

The Seventh Circuit's conclusion that a COLA is *per se* a component of a plan participant's "accrued benefit" also conflicts with decisions of the Fourth Circuit (*Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003)) and Ninth Circuit (*San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994)) which held that a COLA is a component of a participant's "accrued benefit" only when the terms of the plan so provide, and conflicts with ERISA, which provides that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

Certiorari is warranted to resolve the lower courts' conflict regarding the definition of "accrued benefit" under ERISA, to reconcile the decision below with ERISA's plain language, and to ensure that defined benefit pension plans – many of which are already facing significant funding shortfalls – are not burdened with liabilities that employers did not agree to pay, which they did not assume in their actuarial calculations, and they may be unable to bear.

ARGUMENT

The Seventh Circuit overrode the clear language of the Rohm and Haas pension plan, which clearly informed plan participants that no COLA would be paid on lump sum withdrawals. The Seventh Circuit held that a COLA offered by a defined benefit pension plan is *always* part of a participant's accrued benefit, even if it is expressly excluded from the plan's definition of that term.

If not reversed, the Circuit Court's decision could have serious consequences for defined benefit pension plans. The decision requires those plans which are funded on the actuarial assumption that a COLA provided to monthly annuitants is not a component of the participants' accrued benefit, to provide a COLA to *all* participants, regardless of the provisions of the plan itself and the financial projections of its sponsor, and prevents those plans from thereafter reducing the COLA's amount due to the "anti-cutback" rule, 29 U.S.C.A. § 1054(g). This new liability will place additional financial burdens on the plans and their sponsors. In addition, the addition of a COLA to lump sum withdrawals increases the incentive for retirees to choose lump sum distribution, which in turn increases the risk that those retirees will draw down their retirement funds prematurely.

I. MANDATORY INCLUSION OF COLA WOULD HAVE SUBSTANTIAL NEGATIVE IMPACT ON OTHER DEFINED BENEFIT PLANS

A. There is a substantial risk of underfunding of retirement.

If the Seventh Circuit was correct in holding that ERISA determines what an accrued benefit is mandatory, notwithstanding a plan's own definition of an accrued benefit and notwithstanding the actuarial calculations of the Plan's sponsor based on the Plan's definitions, many plans may be underfunded because addition of a COLA to lump sum withdrawals undoubtedly places greater burdens on the financial resources of a Plan. The Seventh Circuit's decision compels defined benefit pension plans to shift a portion of their resources from paying annuitants their expected benefits to funding an unexpected and unwarranted COLA for lump-sum recipients.

If plan sponsors, plan administrators, and plan participants did not know whether a benefit is an accrued benefit at the time the Plan was designed and funded, the extent of a plan's liability would be difficult to predict. This, in turn, could result in prevalent underfunding of pension plans, which in turn would lead to the need for additional government funding through the Pension Benefit Guaranty Corporation ("PBGC"). This would lead to increases in PBGC rates for corporate employers. If underfunding occurs the government fisc -- ultimately taxpayers -- will have to cover the shortfall.

B. Annuities are preferable to lump sum distributions from a public policy perspective.

There is already a noticeable, and dangerous, trend toward participants choosing lump sum payments, if they have that option, which the Circuit Court's decision only encourages. A leading actuarial firm has recently written:

> [M]ore defined benefit plans have been paying out benefits in the form of lump sums. In its most recent survey of employee benefits in private industry, the Bureau of Labor Statistics found that 43 percent of all private defined benefit plans offered lump sums and that the overwhelming majority of these allowed workers to take their total benefit in this form (U.S. DOL, 2003: 66)[2] . . . . but there is considerable anecdotal evidence suggesting that, when offered a choice, most retirees choose the lump sum . . . . some employers are worried about workers losing this important traditional pension insurance against longevity risk.
>
> To the extent that lump sums are available, retirees can convert their lump sums into steady, reliable, lifelong income streams. But the evidence so far suggests that they are not doing so. For example, private, tax-qualified retirement plans disbursed $273 billion

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[2] U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2555, National Compensation Survey: Employee Benefits in Private Industry in the United States, 2000 (2003).

> benefits in 1998, nearly 60 percent of that from defined contribution plans. Roughly 30 percent to 40 percent of retirees under private defined benefit plans are taking lump sums. This suggests that as much as three-quarters of private pension distributions in 1998 were cash-outs, most of them to new retirees. And by 1998, many workers who had cashed out of plans earlier and rolled their assets into IRAs had retired and were using those assets to support themselves.

Watson Wyatt Worldwide[3], "Tales of the Dodo Bird and the Yellowstone Wolf: Lessons for DB Pensions and the Retirement Ecosystem," available at http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=15066.

Current policy towards pension plans in the United States discourages annuitization because defined contribution plans are not required to offer an annuity option. Retirees are under-annuitized given the economic value of annuitiziation. *See, e.g.*, Brown, Jeffrey R. and Warshawsky, Mark J., "Longevity-Insured Retirement Distributions From Pension Plans: Market and Regulatory Factors," National Bureau of Economic Research Working Paper 8064 (Jan. 2001) ("Yaari (1965) [Yaari, Menahem E., "Uncertain Lifetime, Life Insurance, and the Theory of the Consumer," *Review of Economic Studies* 32:137-150 (1965)] was the first to demonstrate the economic

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[3] Watson Wyatt Worldwide is an actuarial firm which traces its roots back to the oldest actuarial firm in the world and has an international pension consulting practice.

value of annuitization in a life cycle model with uncertain lifetimes. Within this lifecycle model, the gains from annuitization are substantial. Given this, economists have been somewhat puzzled by the limited extent of annuitization outside of defined benefit plans and Social Security."); *see also* Mitchell, Olivia S., *et al.*, "New Evidence on the Money's Worth of Individual Annuities," National Bureau of Economic Research Working Paper (April 1997) (concerning single-premium, immediate, individual annuities). Among the hypothesized reasons for the apparent lack of annuitization are costs making annuitization less economically attractive and the absence of inflation protection.

A decade ago, the Department of Labor Advisory Council on Employee Welfare and Pension Benefits Working Group noted that "The shift in retirement savings from defined benefit plans to defined contribution plans is well documented." (United States Department of Labor, Advisory Council on Employee Welfare and Pension Benefits, Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (November 18, 1998), available at http://www.dol.gov/ebsa/adcoun/leaknew1.htm at 6 (last accessed 1/13/2008), found that the largest source of leakage was lump sum distributions (*id.* at 7), and that "[T]he number of lump sum distributions will increase. It is critical that the leakage of lump sum distributions from retirement plans be slowed." (*Id.* at 9) The Working Group proposed making annuities the default distribution option in defined contribution plans. (*Id.* at 10).

Employer-provided pensions are "undergo ing a dramatic shift towards defined contribution (DC) plans, in which over 70 percent of participants are not even offered a life annuity as a payout option" despite the fact that annuitization is an important way of

insuring against longevity risk. The lack of opportunity to annuitize within the plan or failure of retirees to opt for annuity distribution because there are no incentives to do so is troubling. "Existing public policy towards private pensions does not encourage annuitization of private retirement resources," but public policy should encourage annuitization because "Annuities have an important role to play in retirement portfolios as a way of insuring that individuals do not outlive their resources." . *See* Brown, Jeffery R., "How Should We Insure Longevity Risk in Pensions and Social Security?" (Center for Retirement Research at Boston College, August 2000, available at http://crr.bc.edu/images/stories/Briefs/ib_4.pdf (last accessed 02/06/2008)) (The primary appeal of the [privately purchased] life annuity is that it offers retirees the opportunity to insure against the risk of outliving their assets by exchanging these assets for a lifelong stream of guaranteed income.)

Moreover, legislative history supports the proposition that annuities are preferable to lump sum distributions.

The House Ways and Means Committee Report for the Pension Protection Act of 2005, (United States House of Representatives, Ways and Means Committee, Report for the Pension Protection Act of 2005, 109th Cong., 1st Sess., House Report 109-232, Part 2) advocated an increase in the interest rate used to compute the lump-sum distribution because:

> "[U]sing an artificially low interest rate in calculating lump sums will result in inflated lump sums which are not the actuarial equivalent of a lifetime annuity. *This makes lump sums more attractive than an annuity, thereby encouraging more employees to take*

> *lump-sum distributions. This may reduce retirement income security by discouraging annuitization. This also leads to a drain on pension plan assets, which can undermine the retirement income security of other plan participants.*"

(*Id.* at 108. Emphasis supplied).

We respectfully submit that there are sound policy reasons, related both to the viability of company pension plans and retirement security for employees, that the Seventh Circuit be reversed and this Court reaffirm that a plan and its employer sponsor has the flexibility to use a COLA as an incentive for retirees to take the benefit in the form of an annuity because of the concern that retirees who do not choose annuities will not adequately budget for their retirement in the long term.

II. THE SEVENTH CIRCUIT'S *PER SE* DEFINITION OF "ACCRUED BENEFIT" IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND THIS COURT'S PRECEDENTS

The Seventh Circuit's conclusion that a COLA is *always* a component of a plan participant's accrued benefit, even though it is explicitly excluded from the definition of "accrued benefit" by the terms of the plan, is squarely at odds with the plain language of ERISA and Congress's intentions when enacting the statute.

ERISA does not require employers to establish pension benefit plans or to provide any specific level of benefits when such plans have been established. *Spink,* 517 U.S. at 887. "[P]rivate parties, not the Government, control the level of benefits" provided by a pension plan through their control over the terms of the plan. *Alessi,* 451 U.S. at 511. ERISA simply ensures that participants actually receive the benefits promised under a plan's terms. *See Cent. Laborers' Pension Fund v. Heinz,* 541 U.S. 739, 743 (2004).

Further, ERISA provides that a participant's accrued benefit is to be "determined under the plan" itself. 29 U.S.C. § 1002(23)(A). The terms of the Rohm and Haas Pension Plan exclude the COLA from the definition of a participant's "accrued benefit." Pet. App. 4a; Pet. App. 69a. The Seventh Circuit's conclusion that the COLA constitutes part of every participant's "accrued benefit" squarely contradicts the plain language of ERISA, which directs courts to look to the plan's terms when defining a participant's "accrued benefit," and squarely conflicts with ERISA's objective of "protecting employees' justified expectations of receiving the benefits their employers promise them." *Heinz, supra* (emphasis added); *see also Alessi,* 451 U.S. at 511. Participants in the Plan who elected to

receive their benefits in a single lump-sum distribution could not have expected to receive a COLA because Plan expressly provides that a COLA is available *only* to participants who elect monthly annuity payments. *See, e.g.*, Pet. App. 59a.

ERISA specifies that an accrued benefit is to be *"determined* under the plan" and it is *"expressed* in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphases added). The Seventh Circuit's decision negates the first element of the statutory definition by holding that any benefit that would be paid as part of a retiree's "annual benefit" is part of the "accrued benefit," even if expressly excluded from the definition of "accrued benefit" by the terms of the plan. The decision on which the Seventh Circuit relied, *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Union*, 980 F.2d 465 (7th Cir. 1992), stated that an "accrued benefit is, 'in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age.'" *Id.* at 468 (citing 29 U.S.C. § 1002(23)(A)), and explicitly read the "determined under the plan" language out of the statutory definition.[4] In

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[4] We believe that *Hickey* is distinguishable, and did not ineluctably lead to the Seventh Circuit's decision in this case. The plan at issue in *Hickey* was a "monthly accrued [defined] benefit" payment plan and the plan itself provided "that on each anniversary of a participant's retirement, the participant's monthly benefit was to be multiplied by an adjustment factor. . .[that] depended upon the increase in the CPI over the prior year." (*Hickey*, 980 F.2d at 467). Thus, in *Hickey*, there was no dispute that the plan itself provided for a COLA. Rather, the issue there was whether the plan could be terminated without providing funding for future increases in the cost of living. The *Hickey* court

(continued...)

the decision below, the Seventh Circuit perpetuated this erroneous statutory interpretation.

This Court's review is warranted to correct the Seventh Circuit's erroneous interpretation of ERISA and to ensure that "private parties" in fact determine "the level of benefits" provided by a plan. *Alessi*, 451 U.S. at 511.

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[4](...continued)
correctly "[v]iew[ed the plan as a whole" and held that "[T]he COLA was inseparably tied to the monthly retirement benefit as a means for maintaining the real value of that benefit. It could not, therefore, be said to be ancillary to the benefit. . . ." *Id.* at 468. In *Hickey* the Court correctly noted that the Summary Plan Description listed cost-of-living benefits as one component of the "normal retirement benefit," and that the summary plan description explained that the COLA would increase the monthly benefits to reflect changes in the cost-of-living and thus plan sponsor treated the COLA as part of the normal benefit rather than a separate unguaranteed benefit. 980 F.2d at 469. This, of course is in sharp contrast to the language of the Rohm and Haas Pension Plan, which explicitly and clearly informed employees that if the elected the lump sum payment option they would receive no COLA.

III. THERE IS A CONFLICT AMONG CIRCUITS WITH RESPECT TO THE MEANING OF "ACCRUED BENEFIT"

The Seventh Circuit held that the "term 'accrued benefit' has a statutory meaning" that always includes a COLA and that "the parties cannot change" that meaning by agreeing on varying a plan's language that explicitly excluding a COLA for one form of payout. 497 F.3d 710, 713, Pet. App. 6a (internal quotation marks omitted). The Seventh Circuit declined to "look to the terms of the plan" when deciding whether the COLA was a component of respondent's "accrued benefit" and instead applied a *per se* rule that any COLA offered to a monthly annuitant is a part of the "accrued benefit" of every plan participant.

The Seventh Circuit's holding conflicts with decisions of the Fourth and Ninth Circuits utilizing a case-by-case approach that looks to a plan's terms to determine whether a COLA constitutes part of a participant's "accrued benefit."

The Ninth Circuit in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994) held that a COLA was not part of the plan's "accrued benefit" because, under the terms of that plan, the COLA was promised for only a limited period of time. *Id.* at *4. The court explained that the "purpose underlying ERISA's protection of accrued benefits is protection of employee expectations." *Id.* Because the plan stated that "[n]o COLAs were to be provided beyond" the limited period set forth in the plan, the COLA was "not an accrued benefit under ERISA" and its elimination did not violate the "anticutback rule." *Id.*

In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA did not constitute an "accrued benefit" for participants who retired before the COLA had been implemented because the terms of the plan in effect at the time of the participants' retirement did not provide for a COLA. *Id.* at 605. Construing the definition of "accrued benefit" in the Internal Revenue Code, the Fourth Circuit explained that the "definition does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(I)) (emphases added).[5] *See also Nobel v. Vitro Corp.*, 885 F.2d 1180, 1195 (4th Cir. 1989) (the terms of an ERISA plan can lawfully provide participants who select monthly annuity payments with enhanced benefits beyond their accrued benefit and those enhanced benefits need not be provided to participants who elect a lump-sum distribution).

The Seventh Circuit's holding that a COLA, if provided to any class of participants, is *always* part of *every* participant's "accrued benefit," regardless of the express terms of the plan, is directly at odds with the holdings of the Fourth and Ninth Circuits.

The approach used by Ninth and Fourth Circuits, which "look[ed] to the terms of the plan at issue" and determin[ed] that the plan did not include a COLA in its definition of "accrued benefit," *Sheet Metal Workers*, 318 F.3d at 602-03, is consistent with the teaching of

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[5] The definition of "accrued benefit" in Section 411 of the Internal Revenue Code, 26 U.S.C. § 411(a)(7)(A)(I), is substantively identical to ERISA's, 29 U.S.C. § 1054(c)(3).

this Court in *Alessi*, 451 U.S. 504, 511 (private parties, not the Government, control the level of benefits provided by a pension plan through their control over the terms of the plan), in *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, ("ERISA [does not] mandate what kind of benefits employers must provide if they choose to have such a plan.") and in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("employers have large leeway to design disability and other welfare plans as they see fit").

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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